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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION

11 MR. GREGORY DOWNS, } Case No. 2:22-cv-08795-JLS-JDE  
12 Petitioner/Plaintiff, }  
13 v. } ORDER DISMISSING ACTION  
14 A. CHAPMAN, ADA Coordinator, } WITHOUT PREJUDICE  
15 et al., }  
16 Respondents/Defendants. }

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18 I.

19 INTRODUCTION

20 On November 28, 2022, the Court received from Gregory Downs, an  
21 inmate at California State Prison Los Angeles ("Prison"), located in Lancaster,  
22 California, proceeding pro se as "Petitioner/Plaintiff," a document titled:

23 REQUEST FOR THE COURT TO ORDER  
24 RESPONDENT/DEFENDANT TO FILE ARMSTRONG V.  
25 SCWARZENEGGER & CLARK V. CALIFORNIA TWO  
26 COURT ORDER REMEDIAL PLAN APPLICATION

27 REQUEST FOR CALENDAR A ZOOM HEARING TO  
28 ENABLE THE COURT TO REVIEW CDCR MENTAL  
HEALTH FILE DIAGNOSIS

1 REQUEST FOR COURT TO ORDER CDCR PRODUCE THE  
 2 THE [sic] PETITIONER/PLAINTIFF FOR HEARING TO  
 3 ENABLE THE COURT TO REVIEW CDCR MENTAL  
 4 HEALTH FILE DIAGNOSIS UNDER SEAL

5 Dkt. 1 (“Submission”) at 1 (CM/ECF pagination is used herein for page  
 6 references to Petitioner/Plaintiff’s filings). The Submission named as  
 7 “Respondent/Defendant” 13 individuals who appear to be employed by or  
 8 associated with the California Department of Corrections and Rehabilitation  
 9 (“CDCR”) or the Prison and a “John Doe” defendant. *Id.* Petitioner did not  
 10 pay the filing fee or seek leave to proceed in forma pauperis.

11 On December 6, 2022, the Court issued an order dismissing the  
 12 Submission for its failure to state a claim upon which relief may be granted and  
 13 denying the request for a preliminary injunction. Dkt. 4 (“Dismissal Order”).  
 14 In the Dismissal Order, the Court further ordered Petitioner/Plaintiff, within  
 15 30 days, to file: (1) a First Amended Complaint and either pay the required  
 16 filing fee or file a compliant Request to Proceed without Prepayment of Filing  
 17 Fees with Declaration and supporting materials within the time required; or (2)  
 18 a Notice of Dismissal, concluding:

19 **Petitioner/Plaintiff is cautioned that failure to timely file a fully**  
 20 **compliant response as directed in this Order may result in the**  
 21 **dismissal of this action for the foregoing reasons, failure to**  
 22 **prosecute, and/or failure to comply with a court order.**

23 Dismissal Order at 7-8.

24 After three extensions of time, rather than filing a response in  
 25 compliance with the Dismissal Order as instructed, on March 13, 2023,  
 26 Petitioner/Plaintiff filed a document titled:

27 Fed. Rule 201 (A)(D)(E)(F)  
 28

1 OBJECTION TO THE COURT OPENING AN §1983  
2 REQUEST TO TRANSFER THIS ASPECT OF THE ACTION  
3 TO REMEDIAL PLAN COURT OF NORTHERN DISTRICT  
(OAKLAND)

4 NOTICE OF MOTION FOR (2) TWO 60(B)(6) (FRCP 26(G)(3)  
5 Rule 801(D)(2)(B)

6 UNDER PEN.CODE § 1485.5 & 1485.55 FINDING OF  
7 FACTUAL INNOCENCE/RELEASE FROM PRISON

8 NOTICE OF MOTION FOR PRODUCTION OF  
9 NONPARTY'S STATEMENTS (FRCP 26(A)(B)(3), 33, 34,  
10 AND 36)

11 APPOINTMENT OF COUNSEL AT THE EXPENSE OF  
12 FUTTERMAN DUPREE DODD CROLEY MAIER LLP

13 REQUEST TO CALENDAR FOR A HEARING OF THE  
14 FACTS

15 Dkt. 12 ("Response"). The Response has headings "Declaration," "Standard  
16 for Preliminary Injunction," "I Never Requested a § 1983," "Application for  
17 Certification of Factual Innocence and Jurisdiction to Consider on the Merits,"  
18 "Memorandum Points of Authorities," and "Action Requested" (*id.* at 2-19)  
19 and contains nearly 100 pages of attachments, including minute orders, report  
20 of investigation, a news article, pleadings from other actions, responses to  
21 administrative appeals, portions of Petitioner/Plaintiff's parole hearing from  
22 June 2009, and inmate data reports (*id.* at 20-111).<sup>1</sup> Petitioner/Plaintiff  
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24 <sup>1</sup> Petitioner/Plaintiff also includes a "Request for the Court to Seal HIPAA  
25 Documents/Issue an Order Letting Petitioner/Plaintiff Know Their Out of Cite of  
26 the Public Records," wherein Petitioner/Plaintiff contends that "two weeks ag[o] the  
27 Warden made the admission that J. Clark Kelso had allowed custody to read [his]  
28 MEDICAL FILE A CRIME! HIPAA VIOLATION." Response at 102-03. To the  
extent Petitioner/Plaintiff desires to file any documents under seal or believes that a

clarifies that he never requested “a § 1983,” explaining that he “fil[ed] to obtain counsel under Armstrong v. Schwarzenegger & Clark v. California, Bland v. California Department of Corrections & Rehabilitation appointment of counsel of choice TO FILE SOME 60B’s-F WITH THE COURT,” and requests those “aspect[s] of this action” in which he seeks relief under a preexisting remedial plan entered under prior class actions or consent decrees be transferred “to the Remedial court Northern District because to pursuant to the consent [decree],” he does not “want the Prison Law office to represent” him. Id. at 4, 6. Additionally, he reasserts he will suffer irreparable injury unless a preliminary injunction is issued (id. at 4-5), adds a request to be released from custody apparently based on state law and Rule 60(b) of the Federal Rules of Civil Procedure (“Rule” or “Rules”) (id. at 11-18), and raises arguments regarding one or more other federal actions filed by Petitioner/Plaintiff (id. at 2-3, 10). In the “Action Requested” section, the Response states:

- 1) Address the action off the Declaration grant my release under §1485.5 § 1485.55 etc.
  - 2) Order Futterman Dupree Croley Maier LLP to give deposition along with Cal. AG.
  - 3) ORDER A SENIOR DEPUTY A.G. to sit down for a settlement of the action that the 60(B) is being filed by 3/10/23 at Lancaster bring the checkbook.
  - 4) Issue a protective order.
- anything else that will protect me!

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portion of a previous document should be redacted or sealed, the Court refers Petitioner/Plaintiff to Central District Local Civil Rule 79-5, which sets forth the procedures that must be followed and the standards that will be applied when a party seeks authorization from the Court to file materials under seal.

1 Id. at 19. To the extent, by the Response, Petitioner/Plaintiff seeks an order  
2 appointing counsel or an order compelling production of documents from third  
3 parties, those requests were denied by the assigned Magistrate Judge on March  
4 23, 2023. Dkt. 13 (“Minute Order”).

5 As of the date of this Order, more than 100 days after the date of the  
6 Dismissal Order, Petitioner/Plaintiff has not filed a compliant response to the  
7 Dismissal Order by choosing one of the two options provided and filing the  
8 document required by that option. There is currently no operative pleading and  
9 although Petitioner/Plaintiff contends in his Response that he never requested  
10 a Section 1983 action be opened, Petitioner/Plaintiff has not filed a Notice of  
11 Dismissal as instructed in the Dismissal Order.

12 As a result, for the reasons set forth below, this action is dismissed  
13 without prejudice.

## 14 II.

### 15 STANDARD OF REVIEW

16 As Petitioner/Plaintiff is a prisoner seeking relief from governmental  
17 employees, under 28 U.S.C. § 1915A(b), the Court must review the operative  
18 pleading to determine whether the action is frivolous or malicious, fails to state  
19 a claim on which relief may be granted, or seeks monetary relief against a  
20 defendant who is immune from such relief. A complaint may be dismissed for  
21 failure to state a claim for two reasons: (1) lack of a cognizable legal theory; or  
22 (2) insufficient facts under a cognizable legal theory. Menciondo v. Centinela  
23 Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

24 When reviewing a complaint to determine whether it states a viable  
25 claim, the Court applies the same standard as it would when evaluating a  
26 motion to dismiss under Rule 12(b)(6). See Rosati v. Igbino, 791 F.3d 1037,  
27 1039 (9th Cir. 2015) (per curiam). Rule 12(b)(6), in turn, is read in conjunction  
28 with Rule 8(a). Zixiang Li v. Kerry, 710 F.3d 995, 998-99 (9th Cir. 2013).

Under Rule 8, a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a)(2). Though Rule 8 does not require detailed factual allegations, at a minimum a complaint must allege enough specific facts to provide both “fair notice” of the particular claim being asserted and “the grounds upon which [that claim] rests.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 & n.3 (2007) (citation omitted); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Rule 8 standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”); Brazil v. U.S. Dep’t of Navy, 66 F.3d 193, 199 (9th Cir. 1995) (holding even pro se pleadings “must meet some minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong”); Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th Cir. 1980) (upholding Rule 8 dismissal of “confusing, distracting, ambiguous, and unintelligible pleadings”).

Thus, to survive screening, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). A claim is plausible when the facts alleged would support a reasonable inference that the plaintiff is entitled to relief from a specific defendant for specific misconduct. Id. Allegations that are “merely consistent with” a defendant’s liability, or reflect only “the mere possibility of misconduct” do not show “that the pleader is entitled to relief,” and thus are insufficient to state a claim that is “plausible on its face.” Id. at 678-79 (citations omitted). “Taken together, Iqbal and Twombly require well-pleaded facts, not legal conclusions . . . that ‘plausibly give rise to an entitlement to relief’ . . . . The plausibility of a pleading thus derives from its well-pleaded factual allegations.” Whitaker v. Tesla Motors, Inc., 985 F.3d 1173, 1176 (9th Cir. 2021) (quoting Iqbal, 556 U.S. at 679).

Pleadings by pro se plaintiffs are reviewed liberally and afforded the benefit of the doubt. Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam);



1 see also Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (as amended).  
 2 However, “a liberal interpretation of a civil rights complaint may not supply  
 3 essential elements of the claim that were not initially pled.” Bruns v. Nat’l  
 4 Credit Union Admin., 122 F.3d 1251, 1257 (9th Cir. 1997) (citation omitted).  
 5 “[T]he tenet that a court must accept as true all of the allegations contained in  
 6 a complaint is inapplicable to legal conclusions.” Iqbal, 556 U.S. at 678.

7 Separately, a failure to file an amended complaint by a court-ordered  
 8 deadline, after receiving an admonishment that such a failure could result in  
 9 dismissal, evidences a lack of prosecution. See Link v. Wabash R.R., 370 U.S.  
 10 626, 629-30 (1962); see also Rule 41(b). After a complaint is dismissed with  
 11 leave to amend, “[i]f a plaintiff does not take advantage of the opportunity to  
 12 fix his complaint, a district may convert the dismissal of the complaint into a  
 13 dismissal of the entire action.” Lira v. Herrera, 427 F.3d 1164, 1169 (9th Cir.  
 14 2005). In Carey v. King, 856 F.2d 1439 (9th Cir. 1988), the Ninth Circuit cited  
 15 the following factors as relevant to the Court’s determination whether to  
 16 dismiss an action for failure to prosecute: “(1) the public’s interest in  
 17 expeditious resolution of litigation; (2) the court’s need to manage its docket;  
 18 (3) the risk of prejudice to the defendants; (4) the public policy favoring  
 19 disposition of cases on their merits, and (5) the availability of less drastic  
 20 sanctions.” Id. at 1440; see also Yourish v. California Amplifier, 191 F.3d 983,  
 21 991-92 (9th Cir. 1999) (affirming dismissal for failure to timely file an amended  
 22 complaint, applying the five factors).

### 23 III.

## 24 DISCUSSION

25 As discussed in the Dismissal Order, the Submission did not refer to  
 26 itself as a complaint; rather, the caption merely identified the relief sought and  
 27 referred to the parties as “Petitioner/Plaintiff” on the one hand, and  
 28 “Respondent/Defendant[s]” on the other. Nor did the Submission state on

1 what federal statutory authority, if any, it was brought. In both the title of the  
2 Submission and in the “Action Requested,” Petitioner/Plaintiff relied upon  
3 Armstrong v. Schwarzenegger and Clark v. California, class actions brought  
4 against state officials for violation of the Americans with Disabilities Act  
5 (“ADA”), the Rehabilitation Act, and the Constitution by California state  
6 prisoners and parolees suffering from certain disabilities, cases that resulted in  
7 remedial plans. See Armstrong v. Schwarzenegger, 622 F.3d 1058, 1062-63  
8 (9th Cir. 2010); Clark v. California, 739 F. Supp. 2d 1168, 1173-74 (N.D. Cal.  
9 2010). In the Dismissal Order, the Court liberally interpreted the Submission  
10 as an attempt to set forth a civil complaint and found it failed to state a claim  
11 upon which relief may be granted because: (1) Petitioner/Plaintiff solely  
12 sought relief under remedial plans entered in other cases; and (2) as a civil  
13 rights or ADA action, the Submission did not comply with Rule 8 as  
14 Petitioner/Plaintiff failed to allege sufficient facts to provide Respondents/  
15 Defendants with fair notice of the particular claims being asserted against them  
16 and the federal grounds upon which such claims rested. The Court dismissed  
17 the Submission, but granted Petitioner/Plaintiff leave to amend, instructing  
18 him to either file an amended complaint or dismiss the action, warning him  
19 that failure to do so could result in dismissal for failure to prosecute and/or  
20 failure to comply with a Court order.

21 As noted, dismissal for failure to prosecute or failure to comply with a  
22 court order may be warranted when a party fails to file an amended complaint  
23 within a court-ordered deadline. See Lira, 427 F.3d at 1169; Yourish, 191 F.3d  
24 at 991-92; Carey, 856 F.2d at 1440 (citing the following factors as relevant to  
25 the determination whether to dismiss an action for failure to prosecute: “(1) the  
26 public’s interest in expeditious resolution of litigation; (2) the court’s need to  
27 manage its docket; (3) the risk of prejudice to the defendants; (4) the public  
28 policy favoring disposition of cases on their merits, and (5) the availability of



1 less drastic sanctions”). Despite having been provided the opportunity to file  
2 an amended complaint in the Dismissal Order and having been warned that a  
3 failure to do so could result in dismissal, Petitioner/ Plaintiff did not file an  
4 amended complaint within the time authorized.

5 Applying the Carey factors here, factors one and two, the public’s  
6 interest in expeditious resolution of litigation and the court’s interest in  
7 managing its docket, militate in favor of dismissal for failure to prosecute. The  
8 third factor, the risk of prejudice to the defendants, also favors dismissal. In  
9 Yourish, the Ninth Circuit, after noting that the risk of prejudice to the  
10 defendant is partly measured by the strength of a plaintiff’s reason for failure to  
11 timely file the amended pleading, found that a “paltry” excuse for a late-filed  
12 amended pleading caused the risk of prejudice to the defendant factor to  
13 “strongly support[] dismissal.” Here, no excuse has been provided and no  
14 amended pleading has been filed, meaning the third factor weighs even more  
15 heavily in favor of dismissal. Factor four, the public policy favoring disposition  
16 of cases on the merits, counsels against dismissal; however, as the dismissal is  
17 without prejudice, it would not, in and of itself, preclude consideration of any  
18 claim at some later date in an appropriate forum. Lastly, the fifth factor, the  
19 availability of less drastic sanctions, also counsels in favor of dismissal where,  
20 as here, Petitioner/ Plaintiff did not simply file an amended pleading late, he  
21 did not file it at all. Without an operative complaint, the action stands in legal  
22 limbo, leaving the Court with two alternatives: dismiss the action or leave it  
23 pending without an operative pleading. Under the facts here, there is no viable  
24 lesser alternative. Thus, four of the five factors set forth in Carey favor  
25 dismissal, three of them strongly so. Dismissal of the action is warranted here.

26 Separately, even were the Court to view the Response as an unwieldy  
27 attempt to amend, in the Response, Petitioner/Plaintiff states he “never  
28 requested a § 1983” action and “was filing to obtain counsel under”

1 Armstrong, Clark, and Bland v. California Department of Corrections, 20 F.3d  
 2 1469 (9th Cir. 1994), overruled in part by Schell v. Witek, 218 F.3d 1017, 1025  
 3 (9th Cir. 2000) (en banc). Response at 6. Petitioner/Plaintiff's assertion  
 4 confirms that he has not stated a viable claim. There is no constitutional right  
 5 to appointed counsel in a civil case, see Adir Int'l, LLC v. Starr Indem. &  
 6 Liab. Co., 994 F.3d 1032, 1038-39 (9th Cir. 2021); Storseth v. Spellman, 654  
 7 F.2d 1349, 1353 (9th Cir. 1981), and exceptional circumstances do not exist  
 8 here to designate counsel to represent Petitioner/Plaintiff without pay. See  
 9 Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). In his Response,  
 10 Petitioner/Plaintiff claims he is exercising his right to counsel of his choice  
 11 under Bland. Response at 4. Petitioner's reliance on Bland is misplaced. Bland  
 12 was a habeas proceeding under 28 U.S.C. § 2254, in which the Ninth Circuit  
 13 found the petitioner was denied the right to substitute counsel in his criminal  
 14 case in violation of the Sixth Amendment. See Bland, 20 F.3d at 1479. This is  
 15 not a criminal case; Petitioner/Plaintiff's Sixth Amendment right to counsel is  
 16 not implicated. See Adir Int'l, LLC, 994 F.3d at 1039 ("Unlike in criminal  
 17 cases that implicate the Sixth Amendment right to counsel, civil litigants who  
 18 cannot afford counsel are not constitutionally guaranteed the appointment of a  
 19 lawyer."); United States v. \$292,888.04 in U.S. Currency, 54 F.3d 564, 569  
 20 (9th Cir. 1995) (as amended) ("The protections provided by the Sixth  
 21 Amendment are explicitly confined to 'criminal prosecutions.'" (quoting  
 22 Austin v. United States, 509 U.S. 602, 608 (1993))).

23 In addition, as noted in the Dismissal Order, an inmate seeking relief  
 24 under a preexisting remedial plan entered under prior class actions or consent  
 25 decrees must pursue his requests via the consent decree or through class  
 26 counsel, not by an independent lawsuit. See Hawkins v. California, 2012 WL  
 27 639550, at \*4-5 (E.D. Cal. Feb. 27, 2012) ("To the extent Plaintiff wishes to  
 28 seek relief pursuant to the Armstrong or Clark remedial plans, he 'must pursue

1 his requests via the consent decree or through class counsel.” (quoting  
2 Crayton v. Terhune, 2002 WL 31093590, at \*4 (N.D. Cal. Sept. 17, 2002));  
3 Sykes v. Friederichs, 2007 WL 841789, at \*6 n.12 (N.D. Cal. Mar. 20, 2007).  
4 Thus, as previously explained, as the sole apparent basis for the relief sought  
5 by the Submission and, broadly construed, the Response, may not be granted  
6 by this action, Petitioner/Plaintiff fails to state a claim upon which relief may  
7 be granted in this Court.

8 In his Response, Petitioner/Plaintiff also requests that the Court transfer  
9 “this aspect of this action to the Remedial court Northern District” because he  
10 does not “want the Prison Law office to represent” him. Response at 4.  
11 Petitioner/Plaintiff reiterates “you open this action I didn’t request it or am I  
12 waiving my right to access to the court[s].” Id. As Petitioner/Plaintiff indicates  
13 that he did not intend to file a Section 1983 action and identifies no specific  
14 viable claim to transfer, transfer is not warranted.

15 Transfer of this action is not appropriate for an additional reason. In his  
16 Response, Petitioner now claims to be seeking release from custody based on  
17 state law and Rule 60(b). Response at 1, 11-19. Challenges to the validity of  
18 any confinement or to particulars affecting its duration fall within the “core” of  
19 habeas corpus. Hill v. McDonough, 547 U.S. 573, 579 (2006); Nelson v.  
20 Campbell, 541 U.S. 637, 643 (2004). As such, a petition for habeas corpus is  
21 the “exclusive vehicle” for claims by state prisoners challenging “the fact or  
22 duration of the conviction or sentence.” Nettles v. Grounds, 830 F.3d 922,  
23 927, 934 (9th Cir. 2016) (en banc). To be entitled to habeas relief, the state  
24 petitioner must demonstrate “he is in custody in violation of the Constitution  
25 or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Mere errors of  
26 state law are not cognizable on habeas corpus. See Estelle v. McGuire, 502  
27 U.S. 62, 67-68 (1991). There are several procedural hurdles to seeking relief  
28 under Section 2254, including a one-year statute of limitations, an exhaustion

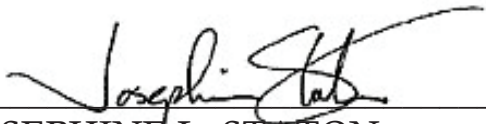
1 requirement, and restrictions on filing second or successive Section 2254  
2 habeas petitions. See 28 U.S.C. §§ 2244, 2254. To the extent Petitioner/  
3 Plaintiff seeks release from custody and/or to set aside his underlying  
4 conviction, he must pursue such relief through a petition for writ of habeas  
5 corpus and meet all of the requirements governing such proceedings. Such  
6 relief is unavailable in this action.

7 **IV.**


8 **CONCLUSION AND ORDER**

9 For the foregoing reasons, Judgment shall be entered dismissing this  
10 action without prejudice to Petitioner/Plaintiff pursuing relief in Armstrong  
11 and/or Clark.

12  
13 Dated: April 10, 2023

14   
15 JOSEPHINE L. STATON  
16 United States District Judge

17 Presented by:

18  
19   
20 JOHN D. EARLY  
21 United States Magistrate Judge